No. 78-611

Supreme Court, U. S.
FILED
NOV 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOHN MIRABAL, SHARON MIRABAL, and ALBERT KORETZKY,

Petitioners,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION and ED MURPHY BUICK-OPEL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT GENERAL MOTORS ACCEPTANCE CORPORATION IN OPPOSITION

JOSEPH DUCOEUR
ALAN I. BECKER
STEVEN LAWSON
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Attorneys for Respondent General Motors Acceptance Corporation

OTIS SMITH
General Counsel
General Motors Acceptance Corporation
3044 W. Grand Boulevard
Detroit, Michigan 48202

RENE RAMIREZ
Attorney
767 Fifth Avenue
New York, New York 10022

Of Counsel

La Salle Street Press — Chicago Printed in U.S.A.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. THE PETITION DOES NOT SATISFY SUPREME COURT RULE 19	4
A. The Courts of Appeals Are Not in Conflict	4
B. The Court of Appeals Did Not Decide Any Issue of Federal Law Requiring Resolution by This Court	6
C. The Decision Below Does Not Conflict With Any Applicable Decision of This Court	7
D. The Proceedings Below Were Not of Such a Nature as to Require This Court's Supervision	7
II. THE DECISION BELOW IS A STRAIGHTFORWARD APPLICATION OF LAW TO THE FACTS OF THIS CASE	7
III. THE LOWER FEDERAL COURTS ARE PECULIARLY WELL-SITUATED TO MAKE RULINGS ON FEE AWARDS	9
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

	PAGE
Barber v. *Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978)	5, 9
Brito v. *Zia Co.*, 478 F.2d 1200 (10th Cir. 1973)	5
Buford v. *American Finance Co.*, 333 F.Supp. 1243 (N.D.Ga. 1971)	3
Doggett v. *County Savings & Loan Co.*, 373 F.Supp. 774 (E.D.Tenn. 1973)	6
Ecenrode v. *Household Finance Corp.*, 422 F.Supp. 1327 (D.Del. 1976)	3
Evans v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974)	5
Finney v. *Hutto*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. ___, 98 S.Ct. 2565 (1978)	5
Hammond v. *Public Finance Corp.*, 568 F.2d 1362 (5th Cir. 1978)	5
Johnson v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)	5
Kerr v. *Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976)	5
King v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. ___, 46 U.S.L.W. 3803 (June 27, 1978)	5
Lea v. *Cone Mills Corp.*, 467 F.2d 277 (4th Cir. 1972)	9
Meyers v. *Clearview Dodge Sales, Inc.*, 384 F.Supp. 722 (E.D.La. 1974), *rev'd in part on other grounds*, 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977)	6
Mirabal v. *General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976)	2
Mirabal v. *General Motors Acceptance Corp.*, 576 F.2d 729 (7th Cir. 1978)	3

	PAGE
Pedro v. *Pacific Plan of California*, 393 F.Supp. 315 (N.D.Cal. 1975)	6
Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955)	4
Sellers v. *Wollman*, 510 F.2d 119 (5th Cir. 1975)	3
Starks v. *Orleans Motors, Inc.*, 372 F.Supp 928 (E.D. La. 1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1974)	6
Thomas v. *Myers-Dickson Furniture Co.*, 479 F.2d 740 (5th Cir. 1973)	9
United States v. *Fruehauf*, 365 U.S. 146 (1961)	6
Waters v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974)	5

Statutes

15 U.S.C. § 1640(a)(3)	2
15 U.S.C. § 1640(c)	2
15 U.S.C. § 1640(g)	3
Ill.Rev.Stat., ch 121½, § 561 *et seq.*	2
Ill.Rev.Stat., ch 121½, § 401 *et seq.*	2

Miscellaneous

Disciplinary Rule 2-106 of the Code of Professional Responsibility of the American Bar Association	
Supreme Court Rule 19(1)(b)	4

No. 78-611

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOHN MIRABAL, SHARON MIRABAL, and ALBERT KORETZKY,

Petitioners,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION and ED MURPHY BUICK-OPEL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT GENERAL MOTORS ACCEPTANCE CORPORATION IN OPPOSITION

QUESTION PRESENTED

Did the court of appeals err in finding that the district court did not abuse its discretion in ruling, on the particular facts before it, that plaintiffs were entitled to $2,000.00 as a reasonable attorney's fee following their recovery of a statutory penalty of $2,000.00 under the Truth in Lending Act?

STATEMENT OF THE CASE

This Truth in Lending action arose out of the sale to petitioners John and Sharon Mirabal of an automobile

financed through a retail installment sales contract in the amount of $2,460.00 which was purchased by GMAC. *Mirabal* v. *General Motors Acceptance Corp.*, 537 F.2d 871, 874 (7th Cir. 1976). Approximately one week after the sale took place, GMAC discovered that the annual percentage rate had been misstated and so notified petitioners. *Ibid.* Petitioners later filed suit, alleging numerous violations of the Truth in Lending Act (but failing to make any claim for the admitted arithmetical error), and added state law claims under the Illinois Motor Vehicle Retail Installment Act, ILL.REV.STAT., ch. 121½, § 561 *et seq.* (1967) and the Illinois Sales Finance Agency Act, ILL.REV.STAT., ch. 121½, § 401 *et seq.* (1967). *Ibid.* The present petition raises no substantive issue under any of these statutes, but seeks only review of the amount of the attorney's fee awarded petitioners pursuant to 15 U.S.C. § 1640(a)(3), which authorizes the district court to award "a reasonable attorney's fee" in "any successful action" to enforce the provisions of the Truth in Lending Act.

After a bench trial, petitioners amended their complaint to add a claim related to the misstated annual percentage rate. The district court ruled that seven violations of the Truth in Lending Act had occurred and awarded petitioners $1,000.00 for each of them. Respondents were also found liable under both state acts, bringing the total penalty assessed to more than $8,000.00. *Ibid.*

The court of appeals reversed the district court in major part. *Ibid.* The court considered only a single substantive issue under the Truth in Lending Act: whether the conceded arithmetical mistake was "not intentional and resulted from a bona fide error" within the meaning of § 130(c) of the Act, 15 U.S.C. § 1640(c), proof of which is a complete defense. It held, one judge dissenting, that respondents had not met the test of that section. *Id.* at 876-79. The

court also ruled that a recent amendment to the Act permitting recovery of a single statutory penalty in an action based on a single transaction, 15 U.S.C. § 1640(g), stated the applicable law on appeal (*id.* at 875-76); that each petitioner was entitled to a separate recovery (*id.* at 881-83); and that respondents' good faith precluded liability under either of the Illinois statutes (*id.* at 883-85). The court did not consider any of the other claims of Truth in Lending violation alleged. The court reduced the $8,126.80 judgment to $2,000.00 and remanded the case to the district court for a determination of costs and attorney's fees. *Id.* at 885.

Petitioners filed their petition for attorney's fees and costs in the form of an affidavit from their attorney, Albert Koretzky. Mr. Koretzky also purports to be a petitioner here. The affidavit averred, without supporting documents or explanation, that he had spent 350 hours on the case, but did not suggest any figure as an appropriate fee. The district court awarded petitioners $2,000.00 as a reasonable attorney's fee. *Mirabal* v. *General Motors Acceptance Corp.*, 576 F.2d 729, 730 (7th Cir. 1978).

Petitioners appealed this award and the Seventh Circuit affirmed, ruling that the district court acted "properly within its discretion." *Ibid.* Their petition for a rehearing and suggestions for a rehearing *en banc* were denied. From that ruling, petitioners seek certiorari.*

---

* John and Sharon Mirabal were the plaintiffs below. Albert Koretzky, their attorney, has added his name to the caption in this Court as a "petitioner." Since he suffered no adverse personal judgment below, he has no standing to seek certiorari. It is clear that the right to attorney's fees under the Truth in Lending Act is personal to the plaintiff, not his attorney. *See, e.g.*, *Sellers* v. *Wollman*, 510 F.2d 119, 123 (5th Cir. 1975); *Ecenrode* v. *Household Finance Corp.*, 422 F.Supp. 1327, 1330 (D.Del. 1976); and *Buford* v. *American Finance Co.*, 333 F.Supp. 1243, 1252-53 (N.D Ga. 1971).

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT SATISFY SUPREME COURT RULE 19.

In considering a petition for a writ of certiorari to a court of appeals, this Court's decision is guided by the considerations set forth in Rule 19(1)(b):

> "Where a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter; * * * or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with the applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioners cannot meet any of Rule 19's applicable criteria.

A. The Courts of Appeals Are Not in Conflict.

Petitioners are asking this Court to review the affirmance of a discretionary award of attorney's fees. In short, they are seeking one more review of a specific factual determination.* Since these factual issues are limited to this case, there is no occasion for conflict between the circuits.

---

* There is no question that petitioners are seeking a third factual review. Mr. Koretzky's *sua sponte* addition of himself as a "petitioner" to this Court evidences his intention to argue positions benefiting only himself, not his clients or the public in general. "[The Court does not] sit for the benefit of the particular litigants." *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Nor does it sit for the benefit of their lawyers.

Even the dissent below, relied upon so heavily by petitioners, recognized that its difference with the majority arose out of a purely factual determination. After noting that the majority had concluded that granting disproportionately large fee awards would "encourage the filing of questionable claims which defendant-creditors will be forced to settle because the costs of litigation will become too prohibitive," the dissent stated: "I share this concern and believe it is an important consideration in making a fee award. My difficulty, however, is that it does not fit *the facts of this case.*" 576 F.2d at 733 (emphasis supplied).

Nor is it possible to discern from the petition any legal issue upon which courts of appeals might be in conflict. There is no question that the amount of attorney's fees awarded in cases under the Truth in Lending Act, as in other cases where a fee award is appropriate, is a matter within the sound discretion of the district court. The statute itself provides that the attorney's fee is to be "determined by the Court." 15 U.S.C. § 1640(a)(3). *See also Hammond* v. *Public Finance Corp.*, 568 F.2d 1362, 1364 (5th Cir. 1978); *Barber* v. *Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978); and *Brito* v. *Zia Co.*, 478 F.2d 1200, 1204 (10th Cir. 1973).

Neither is there conflict over the factors to be considered in setting the amount of an award. The Seventh Circuit in this case followed *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), which adopts the criteria of Disciplinary Rule 2-106 of the Code of Professional Responsibility of the American Bar Association. Other circuits have promulgated virtually identical tests based on this Disciplinary Rule. *See, e.g., Barber* v. *Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir. 1978); *King* v. *Greenblatt*, 560 F.2d 1024, 1026-28 (1st Cir. 1977), *cert. denied*, 438 U.S. ___, 46 U.S.L.W. 3803 (June 27, 1978); *Finney* v. *Hutto*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. ___, 98 S. Ct. 2565 (1978); *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177, 187-88 (D.C. Cir. 1974); and *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

In short, the courts of appeals are not in conflict on any legal issue considered by the two courts below.

B. The Court of Appeals Did Not Decide Any Issue of Federal Law Requiring Resolution by This Court.

As noted above, the Seventh Circuit's review of the district court's discretionary fee award did not involve any legal issue at all, much less "an important question of federal law" as required by Rule 19. The case presented no issue of constitutional law, nor was the validity or interpretation of any federal statute at issue. Finally, the petition does not seek vindication of any individual civil right. Solely and simply, it seeks this Court's aid in garnering an increased fee award for an attorney.

Petitioners' only argument is that "limiting awards of attorney's fees to the amount of recovery obtained is contrary to the policy of the Truth in Lending Act." (Pet. at 6.) However, there is no basis in the record for any conclusion that the fee award in this case was "limited to the amount of recovery." Certainly no inference may be drawn from the fact that the fee award was an even $2,000.00. District courts frequently award fees in Truth in Lending cases in round thousands of dollars. *See, e.g., Starks* v. *Orleans Motors, Inc.*, 372 F.Supp. 928, 933 (E.D.La. 1974), *aff'd*, 500 F.2d 1182 (5th Cir. 1974) ($2,000.00); *Doggett* v. *County Savings & Loan Co.*, 373 F.Supp. 774, 778 (E.D. Tenn. 1973) ($1,000.00); *Pedro* v. *Pacific Plan of California*, 393 F.Supp. 315, 324 (N.D. Cal. 1975) ($3,000.00); and *Meyers* v. *Clearview Dodge Sales, Inc.*, 384 F.Supp. 722, 729 (E.D.La. 1974), *rev'd in part on other grounds*, 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977) ($3,000.00). Since petitioners' argument for granting the writ is based on their assumption that the district court limited the fee award to the amount of judgment, and since that assumption is open to serious doubt, this case lacks the concreteness necessary for adjudication before this Court. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961).

Even if petitioners could support their speculation that the award was in any way "limited" by the district court, they have not adduced a single reason for finding it to be "contrary to the policy" of the Truth in Lending Act. The cases cited by petitioners establish only that some federal statutes provide for the award of a reasonable attorney's fee to successful plaintiffs in order to make enforcement of the underlying substantive law a private, as well as a public matter. Petitioners do not make the slightest effort to explain how the result below is "contrary" to that "policy". Indeed, since, as they point out, "a single violation of the Truth in Lending disclosure requirement is sufficient to trigger the civil liability provisions" (Pet. at 7), the Seventh Circuit's decision means that, for prosecuting a claim based only on an *admitted arithmetical error*, an attorney may receive a $2,000.00 fee. It is inconceivable that the decision below will frustrate any federal policy of encouraging "private attorneys-general" under the Truth in Lending Act.

C. The Decision Below Does Not Conflict with Any Applicable Decisions of this Court.

Petitioners do not suggest that the ruling of the Seventh Circuit is contrary to any decision of this Court.

D. The Proceedings Below Were Not of Such a Nature as to Require This Court's Supervision.

Petitioners have not complained of any procedural irregularity in either court below.

II. THE DECISION BELOW IS A STRAIGHTFORWARD APPLICATION OF LAW TO THE FACTS OF THIS CASE.

After reviewing the facts, the Seventh Circuit explained that its review "is limited to the determination of whether

the district court abused [its] discretion." 576 F.2d at 730. It found no such abuse. The court based its decision on several considerations:

1. The amount of time petitioners' attorney claimed to have spent on the case was "clearly out of proportion to the amount in controversy." *Id.* at 730.

2. The "strong support from the circumstances of the particular case" necessary to justify the award of fees "greatly in excess of a client's recovery" was not present in this case.* Rather, "[t]he instant case involved a one-time individual claim based mainly on a bona fide arithmetical error." *Ibid.*

3. In addition, to permit such a recovery on the basis of a "relatively small injury" would encourage suits not in the interest of the client, much less the public. Permitting inflated fee awards "forces many claims to settlement." Petitioners' attorney volunteered the fact that in another case he had received $12,000.00 in connection with a $400.00 settlement for his client. The court of appeals strongly disapproved this "questionable result," stating:

> "While such disproportionate sum may be exacted in settlement agreements, we should be loathe to automatically provide judicial approval for such results when these cases reach the courts." *Id.* at 731.

The courts below decided this simple fee claim by the application of salutary judicial principles to undisputed facts. The decision should not be disturbed.

* On appeal, petitioners' attorney disclosed his belief that he was entitled to $30,000.00 for his efforts in recovering $2,000.00 for his clients. He supported this belief by the fact that respondent GMAC paid its attorneys a similar amount for a variety of services in connection with the litigation. The court of appeals recognized this to be a thoroughgoing *non sequitur*. 576 F.2d at 731.

III. THE LOWER FEDERAL COURTS ARE PECULIARLY WELL-SITUATED TO MAKE FINAL RULINGS ON FEE AWARDS.

The amount of the fee award rests within the sound discretion of the district court. *Barber* v. *Kimbrells, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978). This is because the trial judge is familiar with the efforts and skill of the attorneys and is in the best position to determine their value to the plaintiff, the court, and the public. *Lea* v. *Cone Mills Corp.*, 467 F.2d 277, 279 (4th Cir. 1972). Hence, the appellate function is only to review the trial judge's exercise of discretion. *Thomas* v. *Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973). This Court is even further removed from that process and should decline to review the facts already ruled on twice below.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

JOSEPH DUCOEUR
ALAN I. BECKER
STEVEN LAWSON

Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Attorneys for Respondent General Motors Acceptance Corporation

OTIS SMITH
General Counsel
General Motors Acceptance Corporation
3044 W. Grand Boulevard
Detroit, Michigan 48202

RENE RAMIREZ
Attorney
767 Fifth Avenue
New York, New York 10022

Of Counsel

November 8, 1978